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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1008

SIDNEY S. HARRIS, *et al.*,

Petitioners,

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*,

and

UNITED STATES OF AMERICA, *et al.*

REPLY BRIEF IN SUPPORT OF CERTIORARI

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More than 20,000 black employees have signed the waivers in this case.[1] The waiver purports to preclude injunctive relief or back pay in a variety of situations which may arise in the future, such as the following:

(1) A black with 30 years employment and a white with only 1 year apply for promotion to a job in department A. The white already works in department A; the black works in department B, an all black department to which he was assigned on the basis of race before 1974. Both applicants are fully qualified to fill the vacancy. The white is given the job because of a rule giving preference to employees from the same department as that in which the job exists;

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[1] The circulation of those waivers, at all but a handful of plants, began on or about March 1, 1976. Counsel for the government advises us that less than 10% of the minority employees involved have refused to sign the waivers.

(2) A black with 30 years employment and a white with only 1 year apply for promotion to a job in a line of progression in department A. The white already works in that line of progression; the black works in the same department but in an all black line to which he was assigned on the basis of race before 1974. Both applicants are fully qualified to fill the vacancy. The white is given the job because of a rule giving preference to employees from the same line of progression as that in which the job exists;

(3) A black with 30 years employment and a white with only 5 years apply for promotion to a job in a line of progression in department A. Both already work in that line. The white, however, has a job higher up in the line because the black, initially assigned, on the basis of race, prior to 1974, to an all black department, has only recently succeeded in transferring into this previously all white department. Both applicants are fully qualified to fill the vacancy. The white is given the job because of a rule giving preference to employees with higher ranking jobs in the line of progression;

(4) A black applies for a job in 1965 and is rejected because of his race; he is subsequently hired in 1967. A white employee hired in 1966 works at the same job. In layoffs from this job, or in promotions to the next job in the line of progression, the white is given a preference because he is senior by 1 year. Compare *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1976).

Although such promotions or layoffs would be clearly illegal, and although the conduct and injury involved in such circumstances, and the controversy that would arise

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about them, would all occur in the future, the defendants urge that the employees' rights can be waived in advance because the first act of discrimination occurred prior to 1974.

The decision of the Fifth Circuit sanctioning such prospective immunity is inconsistent with this Court's subsequent decision in *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1967). The Fifth Circuit reasoned that if a black employee were denied a promotion in 1980 or 1985 because of earlier discrimination in hiring or assignment, that denial would not constitute a new act of discrimination but only a "future effect of past discrimination." Petition, pp. 58a-63a. In *Franks* the plaintiff sought constructive seniority relief, affecting future wages, assignments, vacations, pensions, etc., for employees who prior to 1972 had been denied jobs on the basis of race. *Franks* recognized that the denial of such benefits, originating from a past act of discrimination, was itself a new legal wrong for which Title VII required relief. "[T]he issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that backpay, for example, can never do." 44 U.S.L.W. at 4362, n. 28. For an employee who, despite the consent decrees, needs additional seniority relief to reach his rightful place, the injunctive waiver creates an unlawful obstacle to achieving the objectives of Title VII; "rightful place seniority, implicating an employee's *future* earnings, job security and advancement prospects, is absolutely essential to obtaining this congressionally mandated goal." Id. at 421, n. 21. The monetary waiver removes any incentive for an employer to accord voluntarily seniority relief necessary to place minority employees in their rightful place. See *id.* at 4362, n. 27. *Franks* applied to the specific problem of discriminatory seniority systems this Court's earlier decisions

requiring complete relief to eliminate all vestiges of discrimination. Petition 14-16. For these reasons the decision of the Fifth Circuit should be vacated and remanded for reconsideration in the light of *Franks*.

The question presented by this petition is whether the waivers are valid and whether the protections of Title VII still apply to the tens of thousands of workers and hundreds of plants involved. The companies ask the Court to assume that all seniority problems in the steel industry have been resolved, and that they have eliminated root and branch the effects of pre-decree discrimination.[2] In fact, although the decrees have been in effect for over two years, black employees have not succeeded in reaching their rightful place. The racially identifiable departments and lines of progression remain essentially unscathed; the number of blacks winning under the decrees otherwise unobtainable promotions is not substantial. If the companies and union actually believed that these problems had been solved by the decrees they would not be pressing for the waivers at issue.

The companies suggest that, although these employees have lost the right to the protection of Title VII, they have instead "a mechanism for resolution of complaints" established by the decrees.[3] That mechanism consists of an Implementation Committee at each plant, whose members represent the company and union which the government alleges have engaged in a long history of racial discrimination. There is a single national Audit and Review Committee which is supposed to oversee the operation of the decrees in over 200 plants; that committee consists of 10 representatives of the defendants and a single representa-

[2] Brief in Opposition of Respondent Steel Companies, p. 8.

[3] Brief in Opposition of Respondent Steel Companies, p. 9.

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tive of the government. The Implementation Committees will cease to function in six months,[4] and the Audit and Review Committee will be abolished in 36 months.[5] In resolving employee complaints the practice of these committees has been merely to apply the decrees, rather than the substantive requirements of Title VII. In *Glover* v. *St. Louis, etc. R.R.*, 393 U.S. 374 (1969), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court rejected similar attempts to substitute informal defendant controlled procedures for the requirements of Title VII.

The union suggests that, if the waiver device employed in this case is approved, similar arrangements can be expected in the aluminum, copper, chemical, lead, zinc, silver, gold, can manufacturing, iron ore, and steel fabricating industries.[6] There, as here, the defendants would seek to substitute the negotiated language of a settlement for the strict commands of Title VII, and to transfer enforcement from the federal courts to committees controlled by the discriminatory companies and unions. Such legislation by consent decree, if "generally applied" to remove vast segments of American industry from the coverage of the 1964 Civil Rights Act, would "frustrate the central statutory purposes of eradicating discrimination throughout the economy." *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356, 4363 (1976).

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[5] See consent decree I, ¶ 20.

[6] Brief in Opposition of Respondent United Steelworkers, p. 6, n. 5; Respondent Union's Opposition To Motion To Defer Consideration, p. 2.

[4] These committees were originally scheduled to go out of existence on December 31, 1975. Consent decree I, ¶ 12(d). Counsel for the government advises us that the Audit and Review Committee has extended the life of these committees until October, 1976.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit. The judgment of the Fifth Circuit should be vacated and remanded for reconsideration in light of *Franks*.

Respectfully submitted,

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